

No. 91-1393

Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

A. L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION *Petitioner*

vs.

BOBBY RAY FRETWELL *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

WHETHER THE UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT RESPONDENT FRETWELL WAS DENIED HIS SIXTH AMENDMENT AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL FELONY MURDER TRIAL IN THAT HE SUFFERED PREJUDICE WHEN HIS TRIAL COUNSEL FAILED TO MAKE A "DOUBLE-COUNTING" OBJECTION, BASED ON THE EIGHTH CIRCUIT'S HOLDING IN *COLLINS V. LOCKHART*, 754 F.2d 258 (8TH CIR.), *CERT. DENIED*, 474 U.S. 1013 (1985), TO THE TRIAL COURT'S SUBMISSION TO THE JURY OF THE AGGRAVATING CIRCUMSTANCE OF PECUNIARY GAIN IN LIGHT OF THE FACT THAT *COLLINS* HAD BEEN DECIDED CONTRARY TO THE JOINT OPINION OF THIS COURT IN *JUREK V. TEXAS*, 428 U.S. 262 (1976) AND WAS SUBSEQUENTLY OVERRULED BY THE EIGHTH CIRCUIT.

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A. L. Lockhart, Director, Arkansas Department of
Correction, the petitioner, petitions for a writ of certiorari to
review the judgment of the United States Court of Appeals for
the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Eighth Circuit Court of
Appeals is reported as *Fretwell v. Lockhart*, 946 F.2d 571 (8th
Cir. 1991), and is reprinted in the appendix to petitioner
Lockhart's petition in the instant case seeking a writ of
certiorari from this Court. The opinion of the United States
District Court for the Eastern District of Arkansas is reported
as *Fretwell v. Lockhart*, 739 F. Supp. 1334 (E.D. Ark. 1990),
and is reprinted in the appendix to petitioner Lockhart's
petition in the instant case seeking a writ of certiorari from

this Court. The appendix of Lockhart's petition for certiorari also includes the Eighth Circuit's order denying petitioner Lockhart's petition for rehearing and suggestion for rehearing *en banc*, that was issued on December 4, 1991. The appendix of Lockhart's petition for certiorari also includes the Eighth Circuit's order recalling the mandate in the instant case, which was issued on December 30, 1991.

JURISDICTION

The Eighth Circuit Court of Appeals handed down its opinion in the instant case on September 23, 1991. This decision was rendered by a three-judge panel of the court. Petitioner Lockhart petitioned for rehearing and for rehearing *en banc*. The *banc* of the Eighth Circuit Court of Appeals denied petitioner Lockhart's petition for rehearing *en banc* and the original three-judge panel denied Lockhart's petition for rehearing. Five judges for the Eighth Circuit Court of Appeals, Judges Fagg, Bowman, Wollman, Beam and Loken, voted to grant petitioner Fretwell's petition for rehearing *en banc*. The *banc* of the Eighth Circuit Court of Appeals denied petitioner Lockhart's petition for rehearing *en banc* on December 4, 1991.

This Court has jurisdiction to review the instant case by writ of certiorari. This Court's jurisdiction to review the instant case by means of the writ of certiorari is set forth in 28 U.S.C. §1254(1). Lockhart filed his petition for a writ of certiorari in a timely manner on March 2, 1992. This Court granted petitioner Lockhart's petition seeking the issuance of a writ of certiorari to the United States Eighth Circuit Court of Appeals on May 18, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

"...[A]nd to have the assistance of counsel for his defense. . . ."

The Eighth Amendment to the United States Constitution provides, in pertinent part:

"...[N]or cruel and unusual punishments inflicted."

The first section of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

Arkansas Statute Annotated §41-1501(1)(a) (1977) states:

"A person commits capital murder if:

acting alone or with one or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. . . ." [Arkansas Statute Annotated §41-1501(1)(a) is presently codified as Arkansas Code Annotated §5-10-101(a)(1) (Supp. 1991).]

Arkansas Statute Annotated §41-1303(6) (1977) states:

"[T]he capital murder was committed for pecuniary gain. . . ." [Arkansas Statute Annotated §41-1303(6) is presently codified as Arkansas Code Annotated §5-4-604(6) (Supp. 1991).]

Arkansas Statute Annotated §41-1302(1) (1977) states:

"[T]he jury shall impose a sentence of death if it unanimously returns written findings that:

aggravating circumstances exist beyond a reasonable doubt; and

aggravating circumstances outweigh [outweigh] beyond a reasonable doubt all mitigating circumstances found to exist; and

aggravating circumstances justify a sentence of death beyond a reasonable doubt. [Arkansas Statute Annotated §41-1302(1) is presently codified as Arkansas Code Annotated §5-4-603(a) (Supp. 1991).]

STATEMENT OF THE CASE

This case is before this Court on a petition for writ of certiorari, brought by petitioner A. L. Lockhart, Director, Arkansas Department of Correction, in which he asked this Court to review the decision of the United States Eighth Circuit Court of Appeals in *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991). In *Fretwell v. Lockhart*, a three-judge panel of the Eighth Circuit Court of Appeals affirmed a memorandum order that had been entered by the United States District Court for the Eastern District of Arkansas, pursuant to 28 U.S.C. §2254(d), conditionally granting habeas corpus relief to respondent Bobby Ray Fretwell, a prisoner held on Death Row at the Tucker Unit of the Arkansas Department of Correction. The District Court below in *Fretwell v. Lockhart*, 739 F. Supp. 1334 (E.D. Ark. 1990), vacated Fretwell's death sentence and conditioned reduction of Fretwell's sentence to life imprisonment without the possibility of parole on whether the State of Arkansas would agree to resentence Fretwell. [Such a "retrial" of only the penalty phase of a capital murder trial is permissible in Arkansas. See Ark. Code Ann. §5-4-616 (1987).] Both petitioner Lockhart and respondent Fretwell appealed the district court's memorandum order to the United States Eighth Circuit Court of Appeals.

The Eighth Circuit Court of Appeals handed down its opinion in *Fretwell v. Lockhart* on September 23, 1991. In its opinion, the Court of Appeals concluded that the relief that Fretwell was entitled to was not a "retrial" of the penalty phase of his capital felony murder trial, but prohibition of such a "retrial" and reduction of his death sentence to life imprisonment without possibility of parole. Petitioner Lockhart petitioned the three-judge panel for rehearing and

petitioned the *banc* of the Court of Appeals for rehearing. The *banc* of the court denied rehearing by a vote of five to five. After the *banc* of the Eighth Circuit Court of Appeals denied rehearing, petitioner Lockhart filed the instant petition for writ of certiorari with this Court to review the decision of the Eighth Circuit Court of Appeals in *Fretwell v. Lockhart*.

At the state court level this case had begun in August of 1985, when Fretwell was tried on a charge of capital felony murder in Searcy County Circuit Court. In a trial bifurcated into a guilt/innocence phase and a penalty phase, a jury found Fretwell guilty of capital felony murder, as set forth in Ark. Stat. Ann. §41-1501(1)(a) (Repl. 1977) [presently codified as Ark. Code Ann. §5-10-101(a)(1) (Supp. 1991)]. The Searcy County jury found that on April 29, 1985, Fretwell had murdered a man named Sherman Sullins in the course of robbing him. [The particulars of Fretwell's robbery-murder of Sherman Sullins are set forth in detail by the district court in *Fretwell v. Lockhart*, 739 F. Supp. 1334, 1335 (E.D. Ark. 1990), which is reprinted in the appendix of Lockhart's petition for a writ of certiorari at A-21 to A-28.] After the separate penalty phase of Fretwell's trial, the jury sentenced him to death. (J.A. 12) The state trial court, the Searcy County Circuit Court, had instructed the jury on two aggravating circumstances, "murder committed for the purpose of avoiding or preventing an arrest" and "murder committed for pecuniary gain."¹ (J.A. 7) The jury found only "murder committed for pecuniary gain" as an aggravating circumstance. (J.A. 11) The jury found no mitigating circumstances. (J.A. 11) Fretwell's trial counsel had failed to object to the submission to the jury of the aggravating circumstance of

¹The "avoiding or preventing an arrest" aggravating circumstance is presently codified as Ark. Code Ann. §5-4-604(5) (Supp. 1991). The "pecuniary gain" aggravating circumstance is presently codified as Ark. Code Ann. §5-4-604(6) (Supp. 1991).

"murder committed for pecuniary gain" despite the fact that just over six months earlier, on January 31, 1985, the United States Eighth Circuit Court of Appeals had handed down *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985). In *Collins* the Eighth Circuit Court of Appeals had held that the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment prohibits the use of "pecuniary gain" as an aggravating circumstance in capital felony murder trials where robbery-murder is the capital offense at issue.

Fretwell directly appealed his conviction and death sentence to the Arkansas Supreme Court. The Arkansas Supreme Court affirmed in *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986). Subsequently, Fretwell petitioned the Arkansas Supreme Court for permission to seek post-conviction relief in Searcy County Circuit Court. Fretwell filed this petition pursuant to Arkansas Rule of Criminal Procedure 37.2(a). The Arkansas Supreme Court denied Fretwell's petition requesting permission to seek post-conviction relief in *Fretwell v. State*, 292 Ark. 96, 728 S.W.2d 180 (1987). Subsequently, Fretwell attacked the validity of his capital felony murder conviction and death sentence by filing a petition seeking habeas corpus relief pursuant to 28 U.S.C. §2254(d) with the United States District Court for the Eastern District of Arkansas. The results of Fretwell's habeas corpus petition to the District Court for the Eastern District of Arkansas and the resulting appeal to the United States Eighth Circuit Court of Appeals have been noted above.

In deciding the instant case, the United States Eighth Circuit Court of Appeals concluded that Fretwell had suffered a deprivation of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at trial. Specifically, the

Court of Appeals determined that Fretwell's trial counsel was ineffective in that he failed to make a particular objection. The Court of Appeals concluded that Fretwell's trial counsel was ineffective because he had failed to object at the penalty phase of Fretwell's capital murder trial to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain." According to the Court of Appeals' analysis, Fretwell's trial counsel should have objected to the submission of this aggravating circumstance on the basis of the Court of Appeals' prior decision in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), cert. denied, 474 U.S. 1013 (1985). *Collins v. Lockhart* held that the Fourteenth and Eighth Amendments' prohibition against cruel and unusual punishment prohibits a state from the use of pecuniary gain as an aggravating circumstance in capital felony murder cases where the predicate felony for the murder charge is robbery. According to the Eighth Circuit Court of Appeals in *Collins*, the Eighth Amendment prohibits the use of pecuniary gain as an aggravating circumstance in robbery-murder capital felony murder trials because pecuniary gain duplicates an element of robbery and, therefore, does not genuinely narrow the class of robbery-murderers into a subclass of robbery-murderers that truly deserves the penalty of death.

According to the Court of Appeals in the instant case, had Fretwell's trial counsel made a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain," the state trial court would have followed the rationale of *Collins v. Lockhart* and would not have submitted this aggravating circumstance to the jury. According to the Court of Appeals, had the state trial court not submitted to the jury the aggravating circumstance of "murder committed for pecuniary gain," the jury would have acquitted Fretwell of the

death penalty. Although the Court of Appeals does not say so in so many words, apparently it reached this conclusion because, as a matter of what *did* happen at Fretwell's trial, the jury did not find the other aggravating circumstance that had been submitted to it. (J.A. 7) Also, the Court of Appeals concluded that the only relief permitted by the writ of habeas corpus that would remedy Fretwell's deprivation of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at trial was prohibition of any effort by the State of Arkansas to retry the penalty phase of Fretwell's capital felony murder trial and reduction of his death sentence to the only other possible sentence, that being life imprisonment without possibility of parole. It is the decision by the United States Eighth Circuit Court of Appeals in *Fretwell v. Lockhart*, *supra*, that Fretwell was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at the penalty phase of his capital felony murder trial that petitioner Lockhart asks this Court to reverse.

Petitioner Lockhart's petition requesting the issuance of a writ of certiorari was docketed in this Court on March 2, 1992. This Court granted Lockhart's petition requesting the issuance of a writ of certiorari on May 18, 1992.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Eighth Circuit Court of Appeals in the instant case that affirmed the district court's decision, on habeas corpus review conducted pursuant to 28 U.S.C. §2254(d), to vacate respondent Fretwell's death sentence. The Court of Appeals affirmed the district court's conclusion that Fretwell suffered prejudice — the imposition of the death penalty — because of his trial counsel's ineffective assistance at the penalty phase of Fretwell's bifurcated capital felony murder trial in Searcy County Circuit Court in August of 1985. The Court of Appeals concluded that had Fretwell's trial counsel made an objection to the submission to the jury of the aggravating circumstance of pecuniary gain on the basis of the court's "double-counting" holding in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), the Searcy County Circuit Court would have been required to follow *Collins v. Lockhart* and would not have instructed the jury on the aggravating circumstance of pecuniary gain in the penalty phase of Fretwell's capital felony murder trial. The Court of Appeals concluded that the Searcy County Circuit Court would have been required to follow its decision in *Collins v. Lockhart* on the basis of the Supremacy Clause. *Fretwell v. Lockhart*, 946 F.2d at 577. The Court of Appeals erred in concluding that Fretwell suffered prejudice when his trial counsel failed to make a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain.

Claims of ineffective assistance of trial counsel that are based on counsel's deficient performance are governed by the standards set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland* this Court set forth

a two-pronged analysis that courts are to employ in evaluating claims of ineffective assistance of trial counsel that are based on counsel's deficient performance. In order to determine whether counsel was ineffective, this Court stated in *Strickland* that courts are to review counsel's performance and are also to determine whether the defendant suffered any prejudice as a result of counsel's performance. This Court also held in *Strickland* that defense counsel's role is to adversarially test the strength of the State's proof of the defendant's guilt in order to ensure that the defendant receives a fair trial and that the result of the defendant's trial is a reliable verdict. *Strickland*, 466 U.S. at 684-87. Moreover, this Court stated in *Strickland* that in order to show prejudice a defendant "... must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In *Strickland* this Court also held:

A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for

example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

Id. at 695.

In 1986 this Court further developed the prejudice prong of *Strickland* analysis of ineffective assistance of counsel claims based on counsel's deficient performance in the cases of *Nix v. Whiteside*, 475 U.S. 157 and *Kimmelman v. Morrison*, 477 U.S. 365. In *Nix v. Whiteside* this Court held that respondent Whiteside's trial counsel was not ineffective when he persuaded Whiteside not to take the stand and present perjured testimony in his own defense. Whiteside's trial counsel persuaded him not to do so by threatening to inform the trial court if Whiteside committed perjury and also by stating that he would withdraw from the case if Whiteside did so. In deciding that Whiteside's trial court was not ineffective this Court cited *Strickland v. Washington* and noted that "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Nix*, 475 U.S. at 175. This Court held that Nix suffered no prejudice because confidence in the result of the jury's verdict that he was guilty of second degree murder was not diminished by the absence of his perjured testimony.

In *Kimmelman v. Morrison* this Court held that claims of ineffective assistance of counsel that are based on counsel's failure to move to suppress allegedly illegally seized evidence are not barred from habeas corpus review by federal courts by *Stone v. Powell*, 428 U.S. 465 (1976). In holding that such claims of ineffective assistance of counsel are not barred from review by *Stone v. Powell*, this Court reaffirmed its holding in *Strickland v. Washington* that defense counsel insures that the defendant receives a fair trial, and that the result of the defendant's fair trial is a reliable verdict, by adversarially testing the State's proof of the defendant's guilt. *Kimmelman*,

477 U.S. at 374. Moreover, in *Kimmelman v. Morrison*, this Court stated that its refusal to extend its holding in *Stone v. Powell* to bar federal court review of ineffective assistance of counsel claims based on counsel's failure to move to suppress allegedly illegally seized evidence would not become an exception that would swallow *Stone v. Powell* because the standard of ineffective assistance of counsel set forth in *Strickland v. Washington* was "rigorous" and "highly demanding." *Id.* at 381, 382. In addition, this Court stated that whether a defendant suffered any prejudice from counsel's deficient performance could be evaluated by hindsight consideration of the relative importance of the components of the State's proof of the defendant's guilt. *Id.* at 386-87.

In addition to the majority opinion in *Kimmelman v. Morrison*, Justice Powell wrote a concurring opinion, which was joined by Chief Justice Burger and then Associate Justice Rehnquist. Justice Powell stated that a defendant could never satisfy the prejudice prong of *Strickland v. Washington* by complaining that his trial counsel failed to move to suppress allegedly illegally seized evidence. Justice Powell rested this conclusion on several of this Court's precedents that state that illegally seized evidence is typically highly probative of the defendant's guilt. Justice Powell also relied on this Court's decisions holding that the purpose of the right to counsel is to enable the defendant to adversarially test the strength of the state's proof of his guilt in order to promote the ultimate objective of the trial, which is that the guilty are convicted and the innocent go free. With regard to this premise, Justice Powell wrote, "The right to effective assistance of counsel flows logically from this premise. But it would shake that right loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall." *Id.* at 365.

Fretwell's claim that his trial counsel was ineffective rests on his counsel's failure to object at the penalty phase of Fretwell's capital felony murder trial to the submission to the jury of the aggravating circumstance of pecuniary gain. According to Fretwell, his trial counsel should have objected to the submission to the jury of the aggravating circumstance of pecuniary gain on the basis of the Eighth Circuit Court of Appeals' decision in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), cert. denied, 474 U.S. 1013 (1985). The Court of Appeals had handed down its decision in *Collins v. Lockhart* just over six months prior to Fretwell's trial in Searcy County Circuit Court. Prior to the Eighth Circuit Court of Appeals' review of Fretwell's case, that court overruled *Collins v. Lockhart* in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), cert. denied, 493 U.S. 959 (1989). The Court of Appeals overruled *Collins v. Lockhart* in *Perry v. Lockhart* in 1989 on the basis of this Court's 1988 decision in *Lowenfield v. Phelps*, 484 U.S. 231. In *Lowenfield v. Phelps* this Court did nothing more than apply its joint opinion in *Jurek v. Texas*, 428 U.S. 262. This Court decide *Jurek v. Texas* in 1976, which was nine years before Fretwell stood trial in Searcy County Circuit Court.

The Eighth Circuit Court of Appeals erred in concluding that Fretwell suffered the prejudice of the imposition of the death penalty as a result of his trial counsel's failure to make a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain. As measured by the standard of prejudice set forth by Justice Powell's concurring opinion in *Kimmelman v. Morrison*, the Court of Appeals' decision gave Fretwell a windfall. The windfall nature of the Court of Appeals' decision is apparent, given that *Collins v. Lockhart* was incorrectly decided in the first instance and had been overruled by the Eighth Circuit itself by the time it reviewed Fretwell's case.

Also, the Court of Appeals' conclusion that Fretwell suffered prejudice when his trial counsel failed to make a *Collins v. Lockhart*-based "double-counting" objection is erroneous when measured by the standard of prejudice this Court set forth in *Strickland v. Washington*. The lack of prejudice to Fretwell becomes apparent when the situation at his trial is compared with that of hypothetical defendants similarly situated whose hypothetical trial counsel *did* adversarially test the strength of the State's case. Each of these hypothetical situations assumes that counsel did make a *Collins v. Lockhart*-based "double-counting" objection and assumes further that the state trial court was bound to follow a hypothetical version of the *Collins v. Lockhart* decision that had been decided earlier by the Arkansas Supreme Court. Each assumes further that by the time each hypothetical verdict and sentence is reviewed on direct appeal by the Arkansas Supreme Court that court's hypothetical *Collins v. Lockhart* decision has been overruled by this Court's decision in *Lowenfield v. Phelps*, *supra*.

One of these hypothetical scenarios consists of counsel making a *Collins v. Lockhart* objection, the trial court sustaining the objection and the jury sentencing the defendant to death anyway. Had this hypothetical situation come to pass, the State would win the *Collins v. Lockhart* issue on the merits on its cross-appeal and the defendant would have suffered no prejudice because the jury's decision to sentence him to death would not have been affected by the aggravating circumstance of pecuniary gain because the jury did not consider it. In two other hypothetical situations the defendant loses the *Collins v. Lockhart* issue on its merits before the Arkansas Supreme Court when he directly appeals. The defendant would lose on the merits if his trial counsel makes a *Collins v. Lockhart* objection, the trial court denies the objection and the jury sentences the defendant to death. The defendant would also

lose the *Collins v. Lockhart* issue on its merits (assuming that he directly appealed the *Collins v. Lockhart* issue) if his trial counsel makes a *Collins v. Lockhart* objection, the trial court denies the objection but the jury votes not to sentence the defendant to death. The fourth possible hypothetical situation that could have occurred had trial counsel made a *Collins v. Lockhart* objection would have come to pass if trial counsel makes the objection, the trial court sustains the objection and the jury votes not to sentence the defendant to death. This hypothetical scenario is identical to the Eighth Circuit Court of Appeals' disposition of the instant case. Had this hypothetical scenario come to pass, former jeopardy considerations would prohibit the State from attempting to retry the penalty phase of Fretwell's trial.

The Eighth Circuit Court of Appeals erred in deciding this case as if the fourth hypothetical situation had occurred. The Court of Appeals disposed of the instant case by making unstated assumptions about the "actual process of decision" that the jury would have gone through had Fretwell's counsel made a *Collins v. Lockhart*-based "double-counting" objection that the trial court would have sustained. The Court of Appeals' unstated assumptions amount to guessing that if Fretwell's jury had before it only the aggravating circumstance of murder committed to avoid or prevent an arrest, the jury would not have found this aggravating circumstance, which is what the jury did, in fact, do when it actually deliberated in the penalty phase of Fretwell's trial. (J.A. 7) Of course, when the jury actually deliberated in the penalty phase of Fretwell's trial, it found the aggravating circumstance of pecuniary gain. (J.A. 7) The Court of Appeals erred in making these unstated assumptions about the jury's hypothetical "actual process of decision" because this Court held in *Strickland v. Washington* that in evaluating claims of

ineffective assistance of counsel courts should not consider the "actual process of decision" if it is not part of the record. *Strickland v. Washington*, 466 U.S. at 695. Of course, the jury's actual deliberations are not part of the record in the instant case, much less any set of hypothetical deliberations.

In addition, the guesswork that the Court of Appeals did in reaching the conclusion that Fretwell suffered prejudice from his trial counsel's failure to make a *Collins v. Lockhart*-based "double-counting" objection is also contrary to the analysis that this Court employs in reviewing claims of error that arise in inconsistent verdict cases. In *United States v. Powell*, 469 U.S. 57 (1984) this Court held that, for among other reasons, claims of inconsistent verdicts should not result in reversal and dismissal because individualized assessment of guilty verdicts that are inconsistent with verdicts of not guilty rendered in the same trial ". . . would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." *Id.* at 66.

If this Court should determine that the Eighth Circuit Court of Appeals was correct in concluding that Fretwell suffered prejudice when his trial counsel failed to make a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain, petitioner Lockhart submits that the Court of Appeals erred in barring the State from retrying the penalty phase of Fretwell's capital felony murder trial. The Court of Appeals erred in this regard because when federal courts issue the writ of habeas corpus they limit the remedy of prohibition of retrial only to those situations where the defendant should never have been brought to trial in the first place. Deprivation of a defendant's Sixth Amendment right to the effective

assistance of counsel does not call into question the ability of the state to bring the defendant to trial in the first place. In effect, the Court of Appeals reduced Fretwell's death sentence to life imprisonment without possibility of parole. Federal courts conducting habeas corpus review of death sentences imposed in state criminal trials have no authority to reduce a death sentence to a lesser sentence on the basis of claims of ineffective assistance of counsel. *Dubamel v. Collins*, 955 F.2d 962, 968 (5th Cir. 1992).

ARGUMENT

I.

THE UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS ERRED IN VACATING RESPONDENT FRETWELL'S DEATH PENALTY ON THE BASIS THAT HIS TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO MAKE A "DOUBLE-COUNTING" OBJECTION TO THE TRIAL COURT'S SUBMISSION TO THE JURY OF THE AGGRAVATING CIRCUMSTANCE OF PECUNIARY GAIN BECAUSE FRETWELL SUFFERED NO PREJUDICE WHEN HIS TRIAL COUNSEL FAILED TO MAKE SUCH AN OBJECTION, GIVEN THAT THE OBJECTION WOULD HAVE BEEN BASED ON PERSUASIVE CASE AUTHORITY WAS INCORRECTLY DECIDED AND WAS SUBSEQUENTLY OVERRULED.

A. Introduction.

This case gives this Court the opportunity to determine whether a defendant sentenced to death in a criminal case is deprived of the effective assistance of counsel when the defendant argues that he suffered from prejudice because of trial counsel's failure to make an objection on the basis of binding or persuasive case authority that was subsequently overruled. In these types of ineffective assistance of counsel cases three principles of constitutional law collide. These three principles are: (1) the Eighth Amendment's requirement that death sentences not be imposed in a manner that is arbitrary and capricious; (2) the Sixth Amendment principle, set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), that a defendant's claim of prejudice owing to ineffective assistance of counsel is not to turn on "... the luck of a lawless decisionmaker"; and (3) this Court's

practice of applying fully retroactively decisions on procedural or evidentiary issues in criminal or habeas corpus cases that reject claims of deprivation of rights guaranteed by the United States Constitution. Petitioner Lockhart respectfully submits that the United States Eighth Circuit Court of Appeals' resolution of the collision of these three principles in the instant case was wrong.

Because the Court of Appeals erred in this regard it erroneously concluded that Fretwell suffered prejudice when his trial counsel failed to make a "double-counting" objection, based on the court's holding in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), to the submission to the jury of the aggravating circumstance of pecuniary gain in the penalty phase of Fretwell's capital felony murder trial. The prejudice that the Court of Appeals erroneously concluded Fretwell suffered was the imposition of the death penalty and, therefore, it vacated his death sentence. Lockhart submits that Fretwell suffered no prejudice when his counsel failed to make a *Collins*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain and that when the Eighth Circuit Court of Appeals vacated his death sentence Fretwell reaped a "constitutional windfall" not commanded by the Sixth Amendment's guarantee of the right to effective assistance of trial counsel.²

²The due process clause of the Fourteenth Amendment incorporates the Sixth Amendment's guarantee of the assistance of counsel to defendants accused of felony offenses. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The right to the assistance of counsel includes the right to the effective assistance of counsel. *United States v. Cronin*, 466 U.S. 648, 654 (1984).

B. *The prejudice prong of ineffective assistance of counsel analysis.*

Petitioner Lockhart submits that the Eighth Circuit Court of Appeals erred in concluding that Fretwell suffered any prejudice at the penalty phase of his capital felony murder trial. In order to demonstrate the nature of the Court of Appeals' erroneous conclusion in this regard it is necessary to review the concept of "prejudice" as explained by this Court in its landmark decision in *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, notably *Nix v. Whiteside*, 475 U.S. 157 (1986) and *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

1. *Strickland v. Washington*, 466 U.S. 668 (1984).

Analysis of claims of ineffective assistance of counsel that are based on counsel's deficient performance must begin with this Court's landmark decision in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland v. Washington*, respondent David Washington asserted that his trial counsel was ineffective at the penalty phase of his capital murder trial in that he had failed to offer mitigating evidence establishing Washington's good character and his "chronically frustrated and depressed" emotional state. In a majority opinion written by Justice O'Connor this Court concluded that Washington's counsel had not been ineffective at the penalty phase of Washington's capital murder trial and, in so concluding, this Court set forth the analytical framework that courts are to follow in evaluating claims of ineffective assistance of counsel that are based on counsel's deficient performance.³

³Like *Strickland v. Washington*, the instant case presents a claim of ineffective assistance of counsel that is based on counsel's deficient performance, as opposed to counsel's absence or the actual or constructive

The analytical tool that this Court constructed in *Strickland v. Washington* to analyze claims of ineffective assistance of counsel based on allegations of deficient performance has two prongs: performance and prejudice. In setting forth this two-pronged analysis that courts are to follow in evaluating claims of ineffective assistance of counsel this Court stressed that practical considerations were important. This Court stated:

Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696. As for the two-pronged standard itself, this Court held:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.

¹*Continued*

denial of counsel or interference by the state with counsel's efforts to represent the accused during a critical stage of the proceedings. See generally *United States v. Cronin*, 466 U.S. 648, 659-662 (1984).

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. In establishing this two-pronged analysis of ineffective assistance of counsel claims this Court placed great weight on the adversarial position that defense counsel takes in his client's behalf in a criminal trial. According to this Court in *Strickland v. Washington* it is defense counsel's adversarial testing of the state's proof of the defendant's guilt that insures that the defendant has a fair trial. *Id.* at 685-87. With regard to determining whether counsel's performance was sufficiently adversarial so that counsel ". . . was . . . functioning as the 'counsel' " guaranteed the defendant by the Sixth Amendment this Court was very careful to state that counsel's performance should not be evaluated merely on the basis of hindsight and that a court reviewing counsel's performance should ". . . reconstruct the circumstances of counsel's challenged conduct, and . . . evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 690.

With regard to the prejudice prong of its analysis, this Court stated that the defendant has the burden to prove prejudice resulting from his counsel's alleged deficient performance. *Id.* at 693. To specify the precise burden that a defendant must carry in order to prove the requisite prejudice, this Court drew on its precedents having to do with whether a defendant was denied his right to due process of law when the government failed to disclose exculpatory information

and set forth the following standard for the showing of prejudice:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694. With regard to the defendant's effort to demonstrate prejudice, this Court noted that there were certain presumptions that should be made by and certain factors that should not be considered by a court reviewing a claim of ineffective assistance of counsel. This Court stated:

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the

prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

Id. at 694-95. This Court noted further that in determining whether a defendant suffered prejudice as a result of his counsel's alleged deficient performance, a court should consider the totality of the state's evidence in order to determine the manner, if at all, the findings made by the trier of fact were affected by counsel's deficient performance. *Id.* at 695-96. This Court also noted that verdicts or other conclusions of fact that were supported by overwhelming evidence were less likely to present situations where the defendant suffered prejudice than verdicts or conclusions of fact for which there was weak support in the record. *Id.* at 696. With regard to situations, like the instant case, where the defendant claims that the prejudice he suffered as a result of counsel's deficient performance was the imposition on him of the death penalty, this Court stated:

When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695.

This Court handed down its decision in *Strickland v. Washington*, on May 14, 1984. On that same day this Court handed down another ineffective assistance of counsel decision that elaborates on the primacy of defense counsel's adversarial testing of the state's proof of the defendant's

guilt as that which assures that the defendant receives a fair trial. This case is *United States v. Cronin*, 466 U.S. 648 (1984). In *United States v. Cronin* this Court held that a defendant could not prove that his trial counsel was ineffective merely by pointing to certain factors such as counsel's lack of experience and lack of time to prepare for trial and then by asking a reviewing court to infer that trial counsel was effective. In the course of so holding this Court stated (internal citations and footnotes omitted):

The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." Unless the accused receives effective assistance of counsel, "a serious risk of injustice infects the trial itself."

Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted — even if defense counsel may have made demonstrable errors —

the kind of testing envisioned by the Sixth Amendment has occurred.

Id. at 655-56. In *United States v. Cronin*, this Court again stated that the defendant has the burden to prove that his counsel was ineffective. *Id.* at 658. Without question, both *Strickland v. Washington* and *United States v. Cronin* rest on the time-honored assumption that it is defense counsel's adversarial testing of the state's proof of the defendant's guilt that guarantees the defendant a fair trial, which, in turn, guarantees that the truth will emerge.

2. *Nix v. Whiteside*, 475 U.S. 157 (1986).

In 1986 this Court further elaborated the analytical tool of "prejudice" for Sixth Amendment ineffective assistance of counsel claims that it had introduced in *Strickland v. Washington* two years earlier. In *Nix v. Whiteside*, 475 U.S. 157, in a majority opinion written by Chief Justice Burger, this Court held that respondent Whiteside's trial counsel was not ineffective when he successfully discouraged Whiteside from giving perjured testimony in his own defense.

Whiteside had been charged with murder. He wanted to bolster a defense of self-defense by testifying that he had seen a gun, or at least "something metallic," in the victim's hand just before he stabbed the victim to death. However, prior to trial, Whiteside had consistently told his trial counsel that he had not actually seen a gun in the victim's hand. *Nix v. Whiteside*, 475 U.S. at 160-61. When Whiteside first told his trial counsel that he had seen "something metallic" in the victim's hand, trial counsel questioned him on this point and Whiteside replied, "[I]n Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead." *Id.* at 161. At this time Whiteside's trial counsel discouraged him from taking the

stand and lying in his own defense by telling him that if he did so he would inform the trial court that he believed Whiteside was perjuring himself and he would also withdraw from representing Whiteside. *Id.* at 161.

Whiteside did testify in his own defense at his trial. He testified on direct examination that he believed the victim had a gun and was reaching for it and, in order to protect himself, he stabbed the victim. On cross-examination Whiteside admitted that he had not seen a gun in the victim's hand.

The jury apparently did not believe Whiteside's testimony because it convicted him of second degree murder. Whiteside unsuccessfully sought relief in the state court system and, pursuant to the writ of habeas corpus, at the federal district court level. Whiteside appealed the federal district court's denial of his petition for a writ of habeas corpus to the United States Eighth Circuit Court of Appeals.

Whiteside successfully argued before the Court of Appeals that his trial counsel's threat to inform the trial court if he committed perjury amounted to ineffective assistance of counsel as measured by the standard set forth by this Court in *Strickland v. Washington*. The Court of Appeals concluded that the prejudice prong of *Strickland v. Washington* standard "... was satisfied by an implication of prejudice from the conflict between [trial counsel's] duty of loyalty to his client and his ethical duties." *Id.* at 163.

This Court reversed the Eighth Circuit's decision that Whiteside's counsel had performed ineffectively. This Court applied the standard it had set forth in *Strickland v. Washington* and concluded that Whiteside's counsel's performance had not been deficient and that Whiteside had

suffered no prejudice. With regard to the prejudice prong, both the majority opinion and a concurring opinion written by Justice Blackmun, which Justices Brennan, Marshall and Stevens joined, emphasized the point first set forth in *Strickland v. Washington* that a defendant's right to the effective assistance of counsel was of primary importance because it led to a reliable result, that is, a result that was consistent with the truth.⁴ The prejudice analysis of both the majority opinion and Justice Blackmun's concurring opinion turned on the absence of a constitutional right to present false testimony in one's own defense. *Id.* at 173-74, 185-86. The majority opinion stated (internal citations omitted):

We hold that, as a matter of law, counsel's conduct complained of here cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry. . . . According to *Strickland*, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." The *Strickland* Court noted that the "benchmark" of an ineffective-assistance claim is the fairness of the adversary proceeding, and that in judging prejudice and the likelihood of a different outcome, "[a] defendant has no entitlement to the luck of a lawless decisionmaker."

Whether he was persuaded or compelled to desist from perjury, Whiteside has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury. Even if we were to assume that the jury might have believed his

⁴Justice Brennan and Justice Stevens each wrote a separate concurring opinion in which each one indicated that respondent Whiteside had failed to demonstrate any prejudice. *Id.* at 176-77; 190-91.

perjury, it does not follow that Whiteside was prejudiced.

Id. at 175. For the concurring Justices, Justice Blackmun wrote (internal citations and footnotes omitted):

The proposition that presenting false evidence could contribute to (or that withholding such evidence could detract from) the reliability of a criminal trial is simply untenable.

It is no doubt true that juries sometimes have acquitted defendants who should have been convicted, and sometimes have based their decisions to acquit on the testimony of defendants who lied on the witness stand. It is also true that the Double Jeopardy Clause bars the reprosecution of such acquitted defendants. . . . But the privilege every criminal defendant has to testify in his own defense "cannot be construed to include the right to commit perjury." To the extent that Whiteside's claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right the law simply does not recognize. "A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice.

Id. at 185-86. With regard to the issue before the Court in the instant case, petitioner Lockhart notes that both the majority opinion in *Nix v. Whiteside* and Justice Blackmun's concurring opinion placed particular emphasis on *Strickland v. Washington*'s holding that "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Id.* at 175, 185. Given the facts of *Nix v. Whiteside*, the reference of both opinions

to the "lawless decisionmaker" holding of *Strickland v. Washington* leads inevitably to the conclusion that, for purposes of determining whether trial counsel was ineffective based on an allegation of deficient performance, a defendant has no right to a verdict based on that which is demonstrably false. In *Nix v. Whiteside* that which was false was the perjured testimony that Whiteside intended to give in his own defense.

3. *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

This Court again discussed the prejudice prong of *Strickland v. Washington* analysis in 1986 in *Kimmelman v. Morrison*, 477 U.S. 365. *Kimmelman v. Morrison* involved a claim of ineffective assistance of trial counsel that was based on counsel's failure to make a timely motion to suppress certain evidence on the basis that it had been illegally seized. The State of New Jersey had accused Morrison of taking a fifteen-year-old girl to his apartment, forcing her on his bed there and raping her. The victim was an employee of Morrison's and he apparently let her return home after having raped her. The girl informed her mother of what had happened and she summoned the police. A few hours after the rape a police officer accompanied the victim to Morrison's apartment. Morrison was not in, but another tenant in the apartment building let them into Morrison's apartment. Once inside the apartment, the police officer, who did not have a search warrant, seized a sheet from Morrison's bed. This sheet was stained with semen and had human hair on it.

At trial, Morrison's trial counsel moved to suppress the bedsheet from admittance into evidence because it had been illegally seized. The trial court ruled that the motion to suppress was untimely. Defense counsel explained that he had not moved to suppress the bedsheet prior to trial because he

had only found out the day before that the police had seized the bedsheet. Trial/counsel was unaware that the police had seized the bedsheet because he had not requested any discovery. Defense counsel had erroneously believed that it was the State's obligation to discover its case to him even though he had not asked the State to do so.

The introduction of the bedsheet formed the basis for the testimony of a number of expert witnesses for the State. These witnesses had performed laboratory tests on the bedsheet and on other evidence, including the victim's underpants and on hair and blood samples provided by the victim and Morrison. These experts testified:

... that the bedsheet had been stained with semen from a man with type O blood, that the stains on the victim's underwear similarly exhibited semen from a man with type O blood, that the defendant had type O blood, that vaginal tests performed on the girl at the hospital demonstrated the presence of sperm, and that hairs recovered from the sheet were morphologically similar to head hair of both Morrison and the victim.

Id. at 370.

Defense counsel vigorously cross-examined the expert witnesses. Defense counsel also called four witnesses to establish that the victim's accusation against Morrison was a lie that she made up because he had been late in paying her wages to her. Morrison himself testified and explained away the semen stain on the bedsheet as the result of intercourse with other women. He also explained that he had taken the victim to his apartment but that he had not raped her. This, according to Morrison, explained why a hair from the victim's head was found on the bedsheet. Morrison explained that,

while in his apartment, the victim had sat down on the bed. Despite defense counsel's efforts and his own testimony and that of his witnesses, Morrison was found guilty by the trial court.

The precise issue before this Court in *Kimmelman v. Morrison* was whether to extend the Court's holding in *Stone v. Powell*, 428 U.S. 465 (1976) to claims of ineffective assistance of counsel that were based on counsel's failure to move to suppress allegedly illegally seized evidence. In *Stone v. Powell* this Court had held, in essence, that claims by defendants in state court trials that they had been convicted on the basis of evidence that was seized in violation of their Fourth Amendment right to be free of unreasonable searches and seizures were not cognizable in petitions for habeas corpus relief brought pursuant to 28 U.S.C. §2254(d). In *Kimmelman v. Morrison* this Court refused to so extend *Stone v. Powell* to claims of ineffective assistance of counsel based on failure to move to suppress allegedly illegally seized evidence.

Much of this Court's opinion in *Kimmelman v. Morrison* explains the differences between the Sixth Amendment right to counsel and the judicially created exclusionary remedy for violations of the Fourth Amendment right to be free of unreasonable searches and seizures. In the course of this explanation this Court cited *Strickland v. Washington* and stated, "[t]he essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Id.* at 374. Moreover, in the course of this explanation, this Court was very careful to note that where a defendant claims that his trial counsel was ineffective because he failed to move to

suppress allegedly illegally seized evidence, the defendant, in order to establish the prejudice required by *Strickland v. Washington*, would have to establish that his Fourth Amendment claim was meritorious and would also have to show "... that there is a reasonable probability that the verdict would have been different absent the excludable evidence. . . ." *Id.* at 375.

The potential merits of a defendant's underlying Fourth Amendment claim received special analytical attention from this Court in *Kimmelman v. Morrison* because the petitioners had argued that such claims, even if meritorious, could not possibly meet the prejudice prong of *Strickland v. Washington* because the exclusionary rule excludes evidence solely on the basis that it was illegally seized and takes no regard of the great probative value that such evidence typically has. This Court flatly rejected the petitioners' interpretation of the prejudice prong of *Strickland v. Washington*. This Court held (internal citations and footnotes omitted):

While we have recognized that the "'premise of our adversary system of criminal justice . . . that partisan advocacy . . . will thus promote the ultimate objective that the guilty be convicted and innocent go free,'" underlies and gives meaning to the right to effective assistance, we have never intimated that the right to counsel is conditioned upon actual innocence. The constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.

Id. at 380.

This Court also rejected another argument advanced by petitioners to the effect that if *Stone v. Powell* were not extended to claims of ineffective assistance of counsel based on counsel's failure to move to suppress allegedly illegally seized evidence, then such a large exception to the rule of *Stone v. Powell* would be opened up that it would simply disappear. This Court rejected this argument by noting that the standard set forth in *Strickland v. Washington* for claims of ineffective assistance of counsel was "rigorous" and "highly demanding." *Id.* at 381, 382.

Petitioners also argued that respondent Morrison had not shown that his trial counsel's performance was deficient. This Court also rejected this argument and did so, in part, because the petitioners argued that the evidence that Morrison's counsel should have moved to suppress — the bedsheet and a semen stain and hairs recovered from the sheet itself — were not as crucial to the state's proof of Morrison's guilt as to testimony of the victim, whom Morrison's trial counsel vigorously cross-examined and attempted to discredit. This Court rejected the petitioners' effort to shore up Morrison's counsel's performance by showing that he had vigorously attacked the most probative parts of the State's proof of his guilt because this argument depended on a hindsight evaluation of the relative strength of the different pieces of evidence that the state used to prove Morrison's guilt. In rejecting this argument this Court stated (internal citations omitted):

Moreover, petitioners' analysis is flawed, however, by their use of hindsight to evaluate the relative importance of the various components of the State's case. See [*Strickland v. Washington*] ("A fair assessment of attorney performance requires that every effort be made

to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"). At the time Morrison's lawyer decided not to request any discovery, he did not — and, because he did not ask, could not — know what the State's case would be. While the relative importance of witness credibility vis-a-vis the bedsheet and the related expert testimony is pertinent to the determination whether respondent was prejudiced by his attorney's incompetence, it sheds no light on the reasonableness of counsel's decision not to request any discovery.

Id. at 386-87. Because Morrison had never had an evidentiary hearing at the district court level on his underlying Fourth Amendment claim, this Court affirmed the Third Circuit Court of Appeals' decision to remand to the district court in order for an evidentiary hearing to be held. *Id.* at 373, 391.

In his concurring opinion, which was joined by Chief Justice Burger and then Associate Justice Rehnquist, Justice Powell addressed an issue that had not been raised by the parties nor discussed by the lower courts. In essence, in this concurring opinion Justice Powell stated that a defendant can never meet the prejudice standard of *Strickland v. Washington* if the defendant's counsel's deficient performance consisted of failing to move to suppress evidence that was allegedly illegally seized but was reliable. In making this argument Justice Powell placed great emphasis on this Court's holding in *Strickland v. Washington* to the effect that the ultimate purpose of counsel's assistance to a defendant in a criminal case was to insure that the verdict in the case was reliable. *Kimmelman v. Morrison*, 477 U.S. at 395 (quoting *Strickland v. Washington*, 466 U.S. at 696). Justice Powell

cited several of this Court's precedents for the proposition that, "... the admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict." *Id.* at 396. Justice Powell stated further that the "... exclusion of illegally seized but wholly reliable evidence renders verdicts less fair and just, because it 'deflects the truthfinding process and often frees the guilty.'" *Id.* at 396. Justice Powell stated further (internal quotations and footnotes omitted):

Thus, the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall. Because the fundamental fairness of the trial is not affected, our reasoning in *Strickland* strongly suggests that such harm does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment.

Common sense reinforces this conclusion. As we emphasized only last Term, and, as the Court recognizes again today, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote *the ultimate objective that the guilty be convicted and the innocent go free.*" The right to effective assistance of counsel flows logically from this premise. But it would shake that right loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall. In this case, for example, the bedsheet may have provided critical evidence of respondent's guilt, evidence whose relevance and reliability cannot seriously be questioned. The admission of the bedsheet thus harmed respondent only in the sense that it helped the factfinder to make

a well-informed determination of respondent's guilt or innocence.

Id. at 396-97. In concluding, Justice Powell noted that he did not vote to reverse the decision of the Third Circuit Court of Appeals because neither the parties below nor the lower courts had raised or discussed the *Strickland v. Washington* prejudice issue that he believed would otherwise be dispositive.

C. *The Collins v. Lockhart* decision and its subsequent overruling.

At its simplest level, the instant case presents a routine application of the principles of law governing claims of ineffective assistance of counsel noted above that were set forth by this Court in *Strickland, supra*. This routine issue of ineffective assistance of counsel is as follows: Was Fretwell's trial counsel ineffective because he failed to make a particular objection at the sentencing phase of Fretwell's capital felony murder trial. The Eighth Circuit Court of Appeals concluded that Fretwell's trial counsel was ineffective because he had failed to make a particular objection at the penalty phase of Fretwell's trial. Specifically, the Eighth Circuit concluded that Fretwell's trial counsel was ineffective, as measured by the standard set forth by this Court in *Strickland v. Washington*, when trial counsel failed to object to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain" in the penalty phase of Fretwell's capital robbery-murder trial. According to the Court of Appeals, Fretwell's trial counsel should have objected to the submission of pecuniary gain as an aggravating circumstance on the basis of the Court of Appeals' holding in the case of *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert.* 474 U.S. 1013 (1985). According to the Court of Appeals, Fretwell suffered prejudice — the jury's sentencing him to death — when his trial counsel failed to make a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain.

In *Collins v. Lockhart*, the Eighth Circuit Court of Appeals held that the cruel and unusual punishment clause of the Eighth and Fourteenth Amendments prohibits the submission to the jury of the aggravating circumstance of

pecuniary gain in death penalty cases where robbery-murder is the capital murder charge at issue. The Court of Appeals reached this conclusion by postulating the universal truth that every robber-murderer kills in order to realize a pecuniary gain. *Id.* at 264. From this first principle the Court of Appeals concluded that a jury would automatically find pecuniary gain as an aggravating circumstance in every robbery-murder case and that, therefore, pecuniary gain "... cannot be a factor that distinguishes some robber-murderers from others." *Id.* at 264. According to the Court of Appeals, such a state of affairs violates the Eighth Amendment's prohibition against cruel and unusual punishment because:

[a]n aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime.

Id. at 264. In essence, in *Collins* the Court of Appeals held that the pecuniary gain aggravating circumstance must further narrow a subclass of capital murderers, robber-murderers, that had already been winnowed out of the class of all murderers by Arkansas' designation of robbery-murder as capital murder. To put the matter another way, in *Collins* the Eighth Circuit Court of Appeals held that in capital murder cases, a state cannot "double-count" an attendant circumstance such as the commission of murder in order to realize a pecuniary gain as an element of capital murder and also as an aggravating circumstance that would justify the imposition of the death penalty.

The Eighth Circuit Court of Appeals handed down its decision in *Collins v. Lockhart* on January 31, 1985. Approximately six months later, in the first week of August,

1985, Fretwell stood trial for the robbery-murder of Sherman Sullins.

In 1988 *Collins v. Lockhart* was effectively overruled. It was effectively overruled by the decision that this Court handed down in the case of *Lowenfield v. Phelps*, 484 U.S. 231 (1988). In *Lowenfield* this Court held that the Eighth Amendment's prohibition against cruel and unusual punishment does not prohibit in death penalty cases the "double-counting" of an attendant circumstance of capital murder so that it serves as both an element of the offense and also as an aggravating circumstance that justifies the imposition of a sentence of death. In reaching this conclusion in *Lowenfield*, this Court did nothing more than apply the joint opinion that this Court had rendered twelve years earlier, in 1976, in the case of *Jurek v. Texas*, 428 U.S. 262. In *Lowenfield* this Court held (internal citations omitted):

The use of "aggravating circumstances" is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in *Jurek v. Texas*, 428 U.S. 262 (1976), establishes this point. The *Jurek* Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the

evidence, the defendant's acts were an unreasonable response to the victim's provocation. *Id.*, at 269. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. *Id.*, at 271-274. But the opinion announcing the judgment noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of *Gregg*, *supra*, and *Proffitt*, *supra*:

"While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose. . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances. . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option — even potentially — for a smaller class of murders in Texas." 428 U.S., at 270-271 (citations omitted).

It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways:

The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. *See also Zant*, *supra*, at 876, n.13, discussing *Jurek* and concluding: "[I]n Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

Lowenfield, at 244-46. Indeed, the Eighth Circuit Court of Appeals itself reached the conclusion that this Court's decision in *Lowenfield* overruled its "double-counting" holding in *Collins v. Lockhart*. The Eighth Circuit acknowledged that *Collins* was no longer a valid Eighth Amendment precedent in *Perry v. Lockhart*, 871 F.2d 1384

(8th Cir.), *cert. denied*, 493 U.S. 959 (1989). Like *Collins*, *Perry* was a habeas corpus case in which a robber-murderer attacked the validity of his death sentence because the aggravating circumstance of pecuniary gain had been "double-counted." In *Perry* the Eighth Circuit applied *Lowenfield* retroactively and held, "[w]e conclude, therefore, that *Collins* can neither be harmonized with nor distinguished from *Lowenfield*, and we therefore deem it to have been overruled by *Lowenfield*." *Id.* at 1393. Furthermore, in *Perry*, the Court of Appeals noted that in *Lowenfield* this Court "... did not announce a new rule. It merely applied a rule that had been announced in *Jurek [v. Texas]*, 428 U.S. 262 (1976)." *Id.* at 1394. In *Collins* the Court of Appeals had failed to cite this Court's joint opinion in *Jurek v. Texas*; therefore, *Collins v. Lockhart's* "double-counting" holding was never correct.³

³Notwithstanding the Eighth Circuit's statement in *Collins* that the Arkansas Supreme Court had rejected the *Collins* "double-counting" issue on its merits when it affirmed *Collins's* capital felony murder conviction and death sentence on direct appeal (*Collins*, 754 F.2d at 262) the Arkansas Supreme Court never addressed the *Collins* "double-counting" issue on its merits until after this Court had handed down its opinion in *Lowenfield*. In *Fretwell's* direct appeal the Arkansas Supreme Court did not reach the *Collins* "double-counting" issue because *Fretwell's* counsel failed to raise the issue at the trial court level. *Fretwell v. State*, 289 Ark. 91, 98-9, 708 S.W.2d 630, 634 (1986). The Arkansas Supreme Court addressed the *Collins* double-counting issue for the first time only after this Court decided *Lowenfield*. That court did so in the case of *O'Rourke v. State*, 295 Ark. 57, 746 S.W.2d 52 (1988). In *O'Rourke* the court disposed of the *Collins* "double-counting" issue merely by citing and applying *Lowenfield*. *O'Rourke* at 63-4, 746 S.W.2d at 55-6.

D. Respondent *Fretwell* suffered no prejudice when his trial counsel failed to make a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain.

1. Application of the standard of prejudice set forth by Justice Powell in his concurring opinion in *Kimmelman v. Morrison* shows that *Fretwell* did not suffer any prejudice from his counsel's deficient performance.

Petitioner *Lockhart* urges this Court to adopt the position set forth by Judge Loken when he concluded, in dissent, that *Fretwell* suffered no prejudice from his trial counsel's deficient performance in failing to object to the submission to the jury of the aggravating circumstance of pecuniary gain. In essence, Judge Loken followed the reasoning of Justice Powell's concurring opinion in *Kimmelman v. Morrison, supra*. This Court need not adopt Justice Powell's prejudice analysis for purposes of application of the *Strickland* standard to all claims of ineffective assistance of counsel — this Court need only apply Justice Powell's *Kimmelman* analysis to claims of ineffective assistance of counsel that resemble the instant case procedurally. For these kinds of claims of ineffective assistance of counsel — claims based on trial counsel's failure to raise an objection based on a case law holding that was overruled after the defendant's trial — this Court should conclude that Justice Powell's *Kimmelman* analysis of prejudice is the proper standard. This Court should do so in order to prevent the defendant from receiving what Justice Powell described as "a windfall." *Kimmelman*, 477 U.S. 393, 396. The nature of the windfall that *Fretwell* received from the Court of Appeals is apparent in light of the fact that *Collins v. Lockhart* was incorrectly decided in the first place and was, even by the Court of Appeals' acknowledgment, no longer good law by the time it reviewed *Fretwell*.

well's case. As petitioner Lockhart has shown in section C, *supra*, the Court of Appeals erred in deciding *Collins v. Lockhart* in the first place because it was contrary to this Court's joint opinion in *Jurek v. Texas*, 428 U.S. 262 (1976). Indeed, in the *Collins* opinion itself the Court of Appeals nowhere mentions, much less discusses, *Jurek*.

Petitioner Lockhart argued to the Eighth Circuit Court of Appeals that it had incorrectly decided the *Collins v. Lockhart* "double-counting" issue in the first instance and that had Fretwell's trial counsel made a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain, the Searcy County Circuit Court would have rejected such an objection on the basis of this Court's joint opinion in *Jurek* and on the basis of this Court's subsequent affirmation of *Jurek* as good law in this Court's opinion in *Zant v. Stephens*, 462 U.S. 862, 875 n.13 (1983). Both *Jurek v. Texas* and *Zant v. Stephens* had been handed down by this Court well before August, 1985, when Fretwell stood trial in Searcy County Circuit Court for the robbery-murder of Sherman Sullins.

Lockhart buttressed his argument in this regard to the Court of Appeals by pointing out that this Court's opinion in *Lowenfield v. Phelps* had effectively overruled *Collins v. Lockhart* and that in *Lowenfield* this Court had done nothing more than routinely apply *Jurek v. Texas*. The Court of Appeals rejected Lockhart's contention that the Searcy County Circuit Court would have followed *Jurek v. Texas* had Fretwell's counsel made a "double-counting" objection based on *Collins v. Lockhart*. The Eighth Circuit did so by noting that the death penalty sentencing procedure at issue in *Jurek v. Texas* did not require the jury to balance aggravating circumstances against mitigating circumstances while

Arkansas' death penalty sentencing procedure did require such balancing and by noting that the Searcy County Circuit Court was bound as a matter of the Supremacy Clause to treat *Collins v. Lockhart* as binding precedent with regard to the "double-counting" issue. The Court of Appeals' reasoning on both these points is wrong. The Court of Appeals' errors have bestowed on Fretwell the sort of "windfall" that Justice Powell's analysis of prejudice in his concurring opinion in *Kimmelman v. Morrison* would deny to defendants who cannot show that their counsel's deficient performance led to an unreliable guilty verdict. *Kimmelman*, 477 U.S. at 396-97.

Jurek v. Texas plainly establishes the point that states may perform the required narrowing of the class of all murderers into a subclass of death-eligible murderers at the definitional stage of capital murder. The state trial court, the Searcy County Circuit Court, would have followed *Jurek v. Texas* — as it would have been required to do — and held that Arkansas' death penalty sentencing procedure genuinely narrowed the class of all murderers into a death-eligible subgroup by defining robbery-murder as capital murder. The Eighth Circuit Court of Appeals' opinion in the instant case never explains how the additional step in Arkansas' death penalty procedure of balancing aggravating circumstances with mitigating circumstances would have kept the Searcy County Circuit Court from relying on *Jurek v. Texas* and *Zant v. Stephens*, 462 U.S. 862, 875 n.13 (1983) to conclude that the required genuine narrowing occurred when robbery-murder was defined as capital felony murder. If Fretwell's trial counsel had raised the *Collins v. Lockhart* "double-counting" issue before the Searcy County Circuit Court, that court would have relied on this Court's joint opinion in *Jurek v. Texas* and would have concluded that even if pecuniary gain was an element of robbery-murder, pecuniary gain, as an aggravating

circumstance, could still be balanced in the penalty phase of Fretwell's trial against any mitigating evidence that he might introduce. Lockhart's argument in this regard turns on this Court's holding in *Strickland v. Washington* and *Nix v. Whiteside* that "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Strickland*, 466 U.S. at 695 and *Nix*, 475 U.S. at 175. *Collins v. Lockhart* was itself a "lawless" decision to the extent that it was contrary to this Court's joint opinion in *Jurek v. Texas*. The Court of Appeals' assumption in the instant case that the Searcy County Circuit Court would have followed *Collins v. Lockhart* and would not have followed *Jurek v. Texas* sets up Fretwell's "windfall" by bestowing on him a "lawless decisionmaker," the Searcy County Circuit Court, whose "lawless decision" would have been to sustain a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain.

The Court of Appeals avoids confronting the "lawless" nature of *Collins v. Lockhart* when viewed by the Searcy County Circuit Court at the time of Fretwell's trial by asserting that if Fretwell's trial counsel made a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain, the Searcy County Circuit Court would have been *required*, by the Supremacy Clause, to accept and apply the "double-counting" rationale of that decision. *Fretwell v. Lockhart*, 946 F.2d at 577. To say the least, the Court of Appeals' reference to the Supremacy Clause, in the context of the instant case, does not make any sense. It would, if, for example, the issue were whether Carl Albert Collins could go to federal district court and, on the strength of his victory in *Collins v. Lockhart*, bar any effort by Arkansas prison officials to put him to death. Of course, there is no such issue in the instant case. The

Supremacy Clause has nothing to do with the doctrine of *stare decisis*.⁶ Lower federal courts and legal scholars have repeatedly concluded that state courts are *not* bound to follow the decisions of lower federal courts. See *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970); *Owsley v. Peyton*, 352 F.2d 804 (4th Cir. 1965); 1B.J. Moore, J. Lucas and T. Currier, *Moore's Federal Practice* Par. 0.402[1] at 23 (1992); 1 R. Rotunda, J. Nowak and J. Young, *supra*, at §1.6(c); Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1053 (1979); and Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 Colum. L. Rev. 943, 945-47 (1948); see also *Sawyer v. Smith*, 497 U.S. —, 110 S. Ct. 2822, 2831, 111 L.Ed.2d 193, 210 (1990) ("[s]tate courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution"). In its opinion in the instant case the Eighth Circuit Court of Appeals cites no authority whatsoever, other than the Supremacy Clause itself, in support of its assertion that the Searcy County Circuit Court was bound to follow its decision in *Collins v. Lockhart*.⁷

⁶The Supremacy Clause is found in Article VI, clause 2 of the United States Constitution. Generally speaking, the Supremacy Clause has been interpreted by this Court to make state law subordinate to the United States Constitution and other federal law and to require state officials to carry out orders issued by federal courts. See *Cooper v. Aaron*, 358 U.S. 1 (1958) and 1 R. Rotunda, J. Nowak and J. Young, *Constitutional Law* §1.6 (1986).

⁷State courts are divided on this issue and there is some state court authority in support of the Court of Appeals' assertion that state courts are bound, as a matter of *stare decisis*, to follow decisions rendered by lower federal courts. See 20 Am. Jur. 2d *Courts* §230 (1965) and 21 C.J.S. *Courts* §159 (1990). The Arkansas Supreme Court does not consider itself bound, as a matter of precedent, by the decisions of lower federal courts. See, e.g., *Hendrickson v. State*, 285 Ark. 462, 466, 688 S.W.2d 295, 297 (1985) (rejecting the Eighth Circuit Court of Appeals' death-qualified jury

2. Fretwell suffered no prejudice when his trial counsel failed to make a *Collins v. Lockhart* "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain as the term of art "prejudice" was explained by this Court in *Strickland v. Washington*.

It is not necessary for this Court to adopt Justice Powell's analysis of *Strickland v. Washington*-type prejudice that he set forth in his concurring opinion in *Kimmelman v. Morrison* in order to reverse the decision of the Court of Appeals in the instant case. This Court may do so simply by relying on the concept of "prejudice" as this Court explained it in *Strickland v. Washington*.

As noted above in section B(1), this Court stated in *Strickland* that a defendant shows that he suffered prejudice as a result of his counsel's deficient performance when the defendant shows "... that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Moreover, this Court implied in *Strickland v. Washington*, and made explicit in *Kimmelman v. Morrison*, that *Strickland v. Washington*-type prejudice analysis can rest on a hindsight view of the facts of the case. *Kimmelman*, 477 U.S. at 386-87. This Court implied in *Strickland v. Washington* that hindsight evaluations of prejudice were permissible when this Court stated that, "... a verdict or conclusion only weakly supported by the

⁷*Continued*
 decision that was eventually reversed by this Court in *Lockhart v. McCree*, 476 U.S. 162 (1986)) and *Ruiz v. State*, 275 Ark. 410, 415, 630 S.W.2d 44, 47-8 (1982) (pre-*Strickland v. Washington* standard for analyzing claims of ineffective assistance of counsel).

record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. See Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths — A Dead End?*, 86 Colum. L. Rev. 9, 93 (1986).

Using a hindsight analysis of the situation that Fretwell would have faced on direct appeal before the Arkansas Supreme Court — assuming that his trial counsel had fulfilled his Sixth Amendment duty and had adversarially tested the strength of the State's proof that Fretwell deserved the death penalty by raising a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain and, assuming further, that the Arkansas Supreme Court itself had rendered the *Collins v. Lockhart* decision but that this hypothetical *Collins v. Lockhart* decision had been effectively overruled by this Court's decision in *Lowenfield v. Phelps*, *supra* — it is evident that in three of the four possible hypothetical scenarios that emerge, the pecuniary gain aggravating circumstance was either not considered by the jury and it sentenced Fretwell to death anyway or Fretwell would have lost on direct appeal on the merits of the *Collins v. Lockhart* issue and in one of the hypothetical situations would still receive the death penalty.

In the first of these hypothetical situations, assuming that Fretwell's counsel had taken the necessary steps to render Fretwell's trial reliable by testing the proof of the State's case for putting Fretwell to death by raising the *Collins v. Lockhart* "double-counting" issue, assuming further that, the trial court sustained counsel's argument based on the Arkansas Supreme Court's hypothetical *Collins v. Lockhart* decision and assuming further that the jury voted to sentence Fretwell to

death anyway, it is clear that Fretwell would have suffered no prejudice because the jury's sentencing Fretwell to death could not have been influenced by the aggravating circumstance of pecuniary gain.

In two of the other possible hypothetical scenarios, Fretwell would lose on the *Collins v. Lockhart* issue on the merits before the Arkansas Supreme Court, assuming that by the time that court considered the issue, its own hypothetical *Collins v. Lockhart* decision had been overruled by this Court's decision in *Lowenfield v. Phelps*. One of these hypothetical situations occurs if Fretwell's counsel raises the *Collins v. Lockhart* "double-counting" issue on its merits, the trial court denies the objection and the jury sentences Fretwell to death. In this hypothetical situation, Fretwell would appeal this issue on its merits and he would lose before the Arkansas Supreme Court.⁸ The third hypothetical situation where Fretwell loses on the merits before the Arkansas Supreme Court is very much like the hypothetical situation just described. In this third hypothetical situation, Fretwell's counsel raises the *Collins v. Lockhart* "double-counting" issue on its merits, the trial court denies counsel's argument, but the jury does not sentence Fretwell to death. In this hypothetical situation Fretwell could raise the *Collins v. Lockhart* issue on direct

⁸The Arkansas Supreme Court applies *Lowenfield v. Phelps* retroactively to cases pending on direct appeal. See, e.g., *Ruiz v. State*, 299 Ark. 144, 154-55, 772 S.W.2d 297, 302 (1989). In this regard, the Arkansas Supreme Court follows the same practice as this Court. This Court will overrule its precedents and apply the overruling decision retroactively to cases on direct review and reject procedural and evidentiary claims in criminal cases. See, e.g., *Payne v. Tennessee*, 501 U.S. —, 111 S. Ct. 2597, 115 S. Ct. 720 (1991) (overruling *South Carolina v. Gathers*, 490 U.S. 805 (1989) and *Booth v. Maryland*, 482 U.S. 496 (1987)); see also *Stringer v. Black*, 503 U.S. —, 112 S. Ct. 1130, 1139, 117 L.Ed.2d 367, 382 (1992) and Fallon and Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1745 (1991).

appeal to the Arkansas Supreme Court (assuming that he had standing to do so) and would lose on the merits, however the State could not retry the penalty phase of Fretwell's trial. See footnote 9, *infra*. In this hypothetical situation Fretwell suffered no prejudice from the jury's consideration of the pecuniary gain aggravating circumstance because the jury considered it and chose not to sentence Fretwell to death.

The circumstances of three hypothetical scenarios noted above are very important with regard to this Court's resolution of the instant case. In each of these three hypothetical situations, Fretwell's trial counsel fulfilled his Sixth Amendment duty by raising the *Collins v. Lockhart* "double-counting" issue. In each of these three hypothetical situations, because counsel did adversarially test the strength of the State's proof that Fretwell should die, according to this Court's holdings in *Strickland v. Washington*, *Nix v. Whiteside*, and *Kimmelman v. Morrison*, Fretwell's trial was fair and produced a reliable result where "... the guilty [were] convicted and the innocent [went] free." *Kimmelman v. Morrison*, 477 U.S. at 379-80. Fretwell, whose counsel was ineffective, should be no better off for his counsel's ineffectiveness than these three hypothetical Fretwells whose hypothetical counsel were effective in that they raised the *Collins v. Lockhart* "double-counting" issue and thereby adversarially tested the strength of the State's proof that Fretwell should be put to death. Two of these three hypothetical Fretwells would be put to death and one would live even though the jury considered pecuniary gain as an aggravating circumstance. To say the least, it would stand the notion of effective assistance of counsel on its head for Fretwell to be in a more advantageous position because his counsel failed to adversarially challenge the strength of the State's proof that he should be put to death than hypothetical

defendants who lose the *Collins v. Lockhart* issue on its merits on direct appeal and are put to death.

The fourth possible hypothetical scenario is identical to the Court of Appeals' disposition of the instant case. Given that this hypothetical situation, like the other three noted above, assumes that the trial court was bound to follow the Arkansas Supreme Court's hypothetical *Collins v. Lockhart* decision, this fourth hypothetical situation presents the core of the argument accepted by the Eighth Circuit Court of Appeals and the argument that Fretwell will doubtlessly advance to this Court. In this fourth hypothetical situation Fretwell's trial counsel raises the *Collins v. Lockhart* "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain, the trial court sustains the objection and does not instruct the jury on the aggravating circumstance of pecuniary gain and the jury votes not to sentence Fretwell to death. The State would win the *Collins v. Lockhart* argument on its merits on cross-appeal to the Arkansas Supreme Court, however, any retrial of the penalty phase of Fretwell's trial would be barred by former jeopardy principles, given that Arkansas' capital sentencing procedure is trial-like.⁹ In essence, the Court of Appeals

⁹In *Bullington v. Missouri*, 451 U.S. 430 (1981) this Court held that a state cannot retry the penalty phase of a bifurcated capital murder trial if the jury votes not to sentence the defendant to death if the penalty phase of the trial is sufficiently trial-like. Arkansas' death penalty sentencing procedure was, in August, 1985 when Fretwell stood trial (and still is today) sufficiently trial-like for purposes of application of *Bullington v. Missouri*, *supra*, especially given the requirement that the State must prove its aggravating circumstances beyond a reasonable doubt. Ark. Stat. Ann. §41-1302(1)(a) (1977) (presently codified as Ark. Code Ann. §5-4-603(a)(1) (Supp. 1991)). In any event, as a matter of Arkansas Supreme Court case law, the State is forbidden from seeking the death penalty a second time for the same offense after a jury has voted not to sentence the defendant in a capital murder trial to death. *Fuller v. State*, 246 Ark. 704, 709-10, 439 S.W.2d 801, 804, *cert. denied*, 396 U.S. 930 (1969).

rendered its decision in the instant case on the basis of this hypothetical situation. The crux of the Eighth Circuit's analysis is not explicitly stated by the majority opinion, however, Judge Loken, in dissent, identified the key point of the Court of Appeals' majority decision when he stated, "Presumably the majority limits the state's resentencing options to life imprisonment on the assumption that Fretwell's sentencing jury would have sentenced him to life if not instructed that pecuniary gain could be an aggravating circumstance. Of course, this assumption is highly speculative." *Fretwell*, 946 F.2d at 579-80. Lockhart submits that Judge Loken's observation is entirely correct — the majority opinion's assumption that the jury would not have sentenced Fretwell to death had Fretwell's counsel made a *Collins v. Lockhart* "double-counting" objection that the state trial court would have sustained is entirely speculative. Apparently, the Eighth Circuit's guesswork in this regard is based on the jury's not finding the other aggravating circumstance that was submitted for its consideration — murder committed for the purpose of avoiding or preventing an arrest. (J.A. 7) Lockhart submits that in making this assumption the majority opinion for the Court of Appeals violated one of this Court's holdings in *Strickland v. Washington* having to do with the way in which prejudice is to be analyzed. In *Strickland v. Washington* this Court stated, "Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review . . . should not be considered in the prejudice determination." *Strickland*, 466 U.S. at 695. The Court of Appeals' majority opinion rests on unstated assumptions about what would have been the hypothetical "process of decision" if the jury had before it only the aggravating circumstance of murder committed for the purpose of avoiding or preventing an arrest. Although the *results* of the "process of decision" that the jurors actually went through are part of the record in the instant case, their "process of decision" itself is not part of

the record — the jury's actual deliberations are never part of the record on appeal in a criminal case, much less hypothetical deliberations.

The majority opinion errs not only in making unstated assumptions about the "process of decision" that the jury would have gone through if it had considered only the aggravating circumstance of murder committed to avoid or prevent an arrest, but the Eighth Circuit's unstated assumptions about how the jury would have deliberated are also inconsistent with this Court's approach to the problem of inconsistent verdicts in criminal cases. In *United States v. Powell*, 469 U.S. 57 (1984) this Court held that verdicts of guilty with respect to specific charges that are inconsistent with verdicts of not guilty with regard to related charges in the same trial are not subject to reversal and dismissal. This Court so held because such inconsistencies are not necessarily proof that the jury erred in evaluating the sufficiency of the government's case so much as they are indications of lenity by the jury or nullification by the jury of an arbitrary or oppressive prosecution. In the course of discussing the implications of inconsistent verdicts this Court stated:

We also reject, as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them. Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake.

Id. at 66. Lockhart submits that the majority opinion of the Court of Appeals below necessarily involves this sort of

speculation or the sort of inquiry into the jury's deliberations that this Court refuses to make for claims of error resulting from inconsistent jury verdicts. Lockhart submits that just as this Court will not permit a defendant to attack an inconsistent verdict by means of speculation, this Court should also not permit a defendant to attack a verdict by asking a reviewing court to speculate what would have happened if his trial counsel had made an objection that counsel, in fact, did not make.

E. *The remedy for deprivation of the Sixth Amendment's right to the effective assistance of counsel is a new trial.*

If this Court should conclude that the Eighth Circuit Court of Appeals did not err in concluding that Fretwell suffered prejudice in the penalty phase of his capital felony murder trial when his trial counsel failed to object to the submission to the jury of the aggravating circumstance of pecuniary gain (a position that petitioner Lockhart certainly does not concede), Lockhart submits that the Eighth Circuit Court of Appeals erred in ordering that the proper habeas corpus remedy was prohibition of retrial of the penalty phase of Fretwell's capital murder trial and reduction of his death sentence to a sentence of life imprisonment without possibility of parole. Federal courts conducting habeas corpus review pursuant to 28 U.S.C. §2254(d) are, when the issuance of the writ is warranted, to "... dispose of the matter as law and justice require." 28 U.S.C. §2243. However, when federal courts issue the writ of habeas corpus they limit the remedy of prohibition of retrial only to those situations where the defendant should never have been brought to trial in the first place, such as when the defendant had a former jeopardy-based right or a speedy trial-based right or an *ex post facto*-based right not to be brought to trial at all or where the state had initially prosecuted the defendant on the basis of

a criminal statute that was unconstitutional in some respect. L. Yackle, *Postconviction Remedies* §143 (1981).

In evaluating claims of ineffective assistance of counsel this Court carefully separates the legal issue that underlies the claim of ineffective assistance from the ineffective assistance of counsel claim itself and analyzes it separately in order to determine the proper disposition of the case. See *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Deprivation of the Sixth Amendment right to the effective assistance of counsel does not call into question the ability of the state to bring the defendant to trial in the first place nor does it involve prosecution of the defendant pursuant to an unconstitutional statute. Therefore, the Eighth Circuit Court of Appeals erred in holding that Arkansas is barred from retrying the penalty phase of Fretwell's capital felony murder case. See *Duhamel v. Collins*, 955 F.2d 962, 968 (5th Cir. 1992) (federal court conducting review pursuant to 28 U.S.C. §2254(d) has no authority to reduce a sentence of death to a sentence of life imprisonment on the basis that defendant had been deprived of his right to the effective assistance of counsel).

CONCLUSION

The United States Eighth Circuit Court of Appeals' holding in the instant case that respondent Fretwell suffered a deprivation of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at the penalty phase of his capital felony murder trial in Searcy County Circuit Court is based on an incorrect interpretation of these Amendments to the United States Constitution and should be reversed by this Court. Petitioner Lockhart respectfully requests that this Court reverse the holding of the Eighth Circuit Court of Appeals in the instant case and, in so doing, hold that respondent Fretwell was not deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at the penalty phase of his capital felony murder trial in Searcy County Circuit Court. Petitioner Lockhart respectfully requests further that this Court deny respondent Fretwell any relief whatsoever.

Respectfully submitted,

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